**Pepper Hamilton LLP**
Attorneys at Law

The New York Times Building
37th Floor
620 Eighth Avenue
New York, NY 10018-1405
212.808.2700
Fax 212.286.9806

Martin S. Bloor
direct dial: 212.808.2700
direct fax: 212.868.9806
bloorm@pepperlaw.com

June 15, 2017

**Via Hand Delivery**

The Honorable Ramon E. Reyes, Jr.
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: United States v. Vitaly Korchevsky, Vladislav Khalupsky, Leonid Momotok and Alexander Garkusha (15-CR-0381 (RJD) (RER))

Dear Judge Reyes:

Svetlana Korchevsky ("Mrs. Korchevsky"), through her undersigned counsel, respectfully writes regarding the Government's June 8, 2017 letter requesting adjournment of the ancillary hearing scheduled for June 19, 2017 and/or a meet-and-confer concerning a proposed briefing schedule for a motion by the Government seeking dismissal of Mrs. Korchevsky's petition. For the reasons set forth below, Mrs. Korchevsky respectfully requests that Your Honor deny the Government's request for adjournment and allow the parties to present their cases at the hearing scheduled for June 19, 2017.

## I. BACKGROUND

### A. Preliminary Orders of Forfeiture

As noted in the Government's letter, the Court entered a Preliminary Order of Forfeiture ("POF") (Dkt. 103) as to defendant Alexander Garkusha ("Garkusha"). The POF directed forfeiture of the following parcels of real property:

- The real property and premises located at 1591 Meadow Lane, Glen Mills, Pennsylvania 19342 (the "Meadow Lane Property") of which Garkusha has no ownership interest;

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- The real property and premises located at 3 Skyline Drive, Glen Mills, Pennsylvania 19342 of which Garkusha has no ownership interest;
- The real property and premises located at 7 Skyline Drive, Glen Mills, Pennsylvania 19342 of which Garkusha has no ownership interest;
- The real property and premises located at 10 Skyline Drive, Glen Mills, Pennsylvania 19342 of which Garkusha has no ownership interest;
- The real property and premises located at 9 Blackhorse Lane, Media, Pennsylvania 19063 (the "Blackhorse Lane Property") of which Garkusha has no ownership interest;
- The real property and premises located at 316 Willowbrook Road, Upper Chichester, Pennsylvania 19061 (the "Willowbrook Road Property") of which Garkusha has no ownership interest;
- The real property and premises located at 674 Cheyney Road, Cheyney, Pennsylvania 19319 of which Garkusha has no ownership interest;
- The real property and premises located at 1290 Samuel Road, West Chester, Pennsylvania 19380 (the "Samuel Road Property") of which Garkusha has no ownership interest;
- The real property and premises located at 1737 Graham Road, Macon, Georgia 31211 of which Garkusha has no ownership interest;
- The real property and premises located at 122-134 Lancaster Avenue, Malvern, Pennsylvania 19355 (the "Lancaster Avenue Property") of which Garkusha has no ownership interest;
- The real property and premises located at 1801 Kings Highway, Coatesville, Pennsylvania 19355 of which Garkusha has no ownership interest; and
- The real property and premises at 1709 Slitting Mill Road, Glen Mills, Pennsylvania 19342 (the "Slitting Mill Road Property").

On or about October 3, 2016, the Court entered a Preliminary Order of Forfeiture (Dkt. 113) at to defendant Leonid Momotok ("Momotok"), which directed forfeiture of the same properties listed above (with the exclusion of the real property and premises located at 10 Skyline Drive, Glen Mills, Pennsylvania 19342). Like Garkusha, Momotok has no ownership interest in any of the properties listed above or 10 Skyline Drive, Glen Mills, Pennsylvania

19342. In addition to the real properties listed above, Momotok's POF also directed forfeiture of the following funds:

- $4,651,166.04, more or less, seized on August 11, 2015 from Pershing, LLC account number XXXXXX191 held in the name of NTS Capital Fund, and all proceeds traceable thereto, of which Momotok has no ownership interest;

- $754,393.00, more or less, seized on or about August 11, 2015 from E*trade account number XXXXX623 held in the names of Vitaly Korchevsky and Svetlana Korchevsky, and all proceeds traceable thereto, of which Momotok has no ownership interest; and

- $34,320.36, more or less, seized on or about August 11, 2015 from PNC bank account number XXXXXXXX988 held in the names of Vitaly Korchevsky and Svetlana Korchevsky, an all proceeds traceable thereto, of which Momotok has no ownership interest.

### B. Mrs. Korchevsky's Petition

On May 19, 2017, Mrs. Korchevsky filed her petition requesting an ancillary hearing and asserting her rightful interest in her property. *See* Dkt. 166. Specifically, Mrs. Korchevsky asserted her interest in the funds, the Meadow Lane Property, the Blackhorse Lane Property, the Willowbrook Road Property, the Samuel Road Property, the Lancaster Avenue Property, and the Slitting Mill Road Property (collectively the "Property at Issue").

That same day, this Court granted Mrs. Korchevsky's motion and set the ancillary hearing date for June 20, 2017. This Court later rescheduled the hearing date to June 19, 2017.

To date, the Government has not requested any discovery for this ancillary hearing. Now, eleven days prior to the scheduled hearing, the Government filed its letter requesting adjournment of the scheduled hearing.

## II. MRS. KORCHEVSKY'S HEARING SHOULD NOT BE ADJOURNED

### A. The Government's Statutory Overreach

At the outset, it is important to note that the Government's POFs exceed the statutory authority of 21 U.S.C. § 853. The recent Supreme Court decision of *Honeycutt v. United States* confirms that fact. 581 U.S. __ (2017). In *Honeycutt*, the Court unanimously held that 21 U.S.C. § 853(a) restricts a defendant's forfeiture liability to property he himself actually acquired as a result of the crime, meaning that the defendant must actually own the property. *Id.* at 6 ("Section 853(a)(1) limits forfeiture to the property the defendant 'obtained . . . as a result of' the crime. . . . Neither the dictionary definition nor the common usage of the word 'obtain' supports the conclusion that an individual 'obtains' property that was acquired by someone else."). In its analysis, the Court also noted that the same limitation also applies to § 853(p), the provision for substitute property pursuant to which the Government seized Mrs. Korchevsky's assets:

> Section 853(p)(1) demonstrates that Congress contemplated situations where the tainted property itself would fall outside the Government's reach. To remedy that situation, Congress did not authorize the Government to confiscate substitute property from other defendants or co-conspirators; it authorized the Government to confiscate assets only from the defendant who initially acquired the property and who bears responsibility for its dissipation. Permitting the Government to force other co-conspirators to turn over untainted substitute property would allow the Government to circumvent Congress' carefully constructed statutory scheme, which permits forfeiture of substitute assets only when the requirements of §§ 853(p) and (a) are satisfied. There is no basis to reach such an end run into the statute.

*Id.* at 9 (emphasis added). Garkusha and Momotok have no ownership interest in any of the Property at Issue. Thus, the Government's POFs "circumvent Congress' carefully constructed scheme" and should be amended immediately, not after adjournment. *Id.*

### B. Adjournment Furthers the Violation of Mrs. Korchevsky's Due Process Rights

The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. As such, due process requires that a third party have an early opportunity to challenge an restraining order affecting its property rights where it would be injured by having to wait until after the ancillary hearing. *United States v. Coffman*, 612 Fed. App'x 278, at 289-90 (6th Cir. 2015). Mrs. Korchevsky is jointly liable for taxes in connection to the assets currently seized by the Government. With her assets currently seized by the Government and no available assets to pay those back taxes, Mrs. Korchevsky is in danger of incurring additional interest and fees. Adjourning the scheduled hearing would only heighten that danger and further prejudice Mrs. Korchevsky.

### C. If Mrs. Korchevsky's Claim is Premature, It Should Be Excused

Assuming *arguendo* that Mrs. Korchevsky's motion is premature, it is a direct result of the Government's failure to publish the notice of forfeiture. Under the terms of the POFs, "[t]he United States *shall* publish notice of this Preliminary Order, in accordance with the custom and practice in this district, on the government website www.forfeiture.gov, of its intent to dispose of the Subject Real Properties in such a manner as the attorney General or her designee may direct." Dkt. 104 at 3 (emphasis in original). Further, Federal Rule of Criminal Procedure 32.2 requires the Government to publish notice if the court orders forfeiture of property "to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding." FED. R. CRIM. P. 32.2(b)(6). The Government has flatly failed to meet the notice requirement and now wants to be rewarded for it. If Mrs. Korchevsky's claim is premature, it should be excused.

### D. The Ancillary Hearing Not an "Unlawful Intervention"

Contrary to the Government's argument, the ancillary hearing would not be an "unlawful intervention" prohibited by 21 U.S.C. § 853(k)(1). In fact, the legislative history of § 853(k)(1) cautions that "[t]his provision is not intended to preclude a third party with an interest in property that is or may be subject to a restraining order from participating in a hearing regarding the order." S. Rep. No. 224, 98th Cong., 2d Sess. 206 n. 42 (1983) (explaining parallel provision of RICO statute,) reprinted in 1984 U.S.C.C.A.N. 3182, 3389 n. 42; *see also United States v. Real Property in Waterboro*, 64 F.3d 752, 756 (1st Cir. 1995) (concluding that third party may challenge pretrial restrain on property in criminal forfeiture case). Further, any "burden on the Government" to defend this ancillary proceeding is due to its own statutory overreach.

### E. The Adjudication of Mrs. Korchevsky's Interest Would be Final

In its letter, the Government argues that "[if] the Court proceeded with the ancillary proceeding on Svetlana Korchevsky's petition at this time ahead of all other potential claimants, there would be no finality to the proceeding since the ownership rights of other potential claimants would have yet to be adjudicated." Dkt. 172 at 7. It is unclear how the scheduled ancillary hearing would not result in finality. Mrs. Korchevsky is only asserting *her* interest in the property, not the interest of any other claimant. The scheduled proceeding would allow Mrs. Korchevsky the opportunity to assert her interest in the property and for this Court to decide whether she has met the statutory burden for third-party claimants. This Court's decision would have no implication on the rights of other parties because only Mrs. and Mr. Korchevsky have ownership interests in the Property at Issue, and Mr. Korchevsky's interests will be adjudicated as part of his criminal trial. Even in the rare chance that Mr. Korchevsky is found guilty and the Government sought to seize his assets, the Government could still not seize the assets belonging to Mrs. Korchevsky. *Pacheco v. Seredensky*, 393 F.3d 348, 355 (2d Cir. 2004) (noting that the defendant could only forfeit his interest in the premises). Thus, the scheduled ancillary hearing would result in finality as to Mrs. Korchevsky's interest in the Property at Issue.

For the foregoing reasons, the Government's request for adjournment should be denied.

### III. THE PETITION SHOULD NOT BE DISMISSED

#### A. Mrs. Korchevsky has Standing

As the rightful owner of the Property at Issue, Mrs. Korchevsky has standing under 21 U.S.C. § 853(n)(2). Section 853(n)(2) provides that "[a]ny person, other than the defendant, asserting a legal interest in property which has been ordered forfeited . . . may . . . petition the court for a hearing to adjudicate the validity of his alleged interest in the property." 21 U.S.C. § 853(n)(2). The Government's argument attempts to read additional requirements into the statute. As several courts have recognized, any facially colorable "assertion" of a legal interest in the property which has been ordered forfeited should suffice to confer standing on a third party to contest the forfeiture in an ancillary proceeding. *United States v. Emor*, 785 F.3d 671, 676 (D.C. Cir. 2015) ("In general, any colorable claim on the property suffices, if the claim of injury is 'redressable, at least in party, by a return of property.'"); *United States v. Salti*, 579 F.3d 656, 671-72 (6th Cir. 2009) (petitioner's explanations were sufficient at the pleading stage to support her claim to an interest in Swiss account in her husband's sole name superior to her husband's interest; she presented a facially colorable claim that she should be considered the beneficiary of a constructive trust in the account); *United States v. Henry*, 2015 U.S. App. LEXIS 11282, at *8-9 (11th Cir. July 1, 2015) (district court erred in granting summary judgment for government on standing issue as there was "at least some support in the record for [petitioner's] assertions it owned the Audi and suffered an economic injury because of forfeiture"; court was required to hold an evidentiary hearing). In her petition, Mrs. Korchevsky has made, at the very least, a colorable claim on the property and thus has standing.

#### B. Mrs. Korchevsky has Priority of Interest

Notwithstanding the Government's statutory overreach in seizing the Property at Issue, Mrs. Korchevsky's rights in the Property at Issue vested prior to the Government's interest. In its letter, the Government claimed that Mrs. Korchevsky's claim would "fail on the merits because she cannot demonstrate priority of ownership at the time of the charged offenses, pursuant to 21 U.S.C. § 853(n)(6)(A)." Dkt. 172 at 9. The crux of the Government's claim is that "'[u]nder the relation-back doctrine, title to the forfeited property vests in the United States at the time of the defendant's criminal act.'" *Id.* (citations omitted). The Government's argument misses the mark as the relation-back doctrine is inapplicable to the assets at issue in the POF. As noted in Mrs. Korchevsky's petition, the POFs seized the Property at Issue "as substitute assets pursuant to 21 U.S.C. § 853(p)."[1] Dkt 116. The "relation-back doctrine" does not apply to substitute assets. *See Luis v United States*, 136 S. Ct. 1083, 1091-92 (2016); 21 U.S.C. § 853(c) (limiting the application of the relation-back doctrine to "property described in

[1] Even if the Government wants to take the position that the Property at Issue was forfeited pursuant 21 U.S.C. § 853(a), which is subject to the relation-back doctrine, Mrs. Korchevsky still has priority of interest. Neither Momotok nor Garkusha ever "obtained" an interest at the Property at Issue and therefore that property is not forfeitable under § 853(a). *Honeycutt*, 581 U.S. __, at 6.

subsection (a)"). Thus, the focus of this Court's analysis should be when, under § 853(p), the Government's rights allegedly vested.

When substitute assets vest is an open question in the Second Circuit. *See United States v. Espada*, 128 F. Supp. 3d 555, 562 (E.D.N.Y. 2015) ("This a question of some complexity, since – in contrast to offense property – the relation back provision of § 853(c) does not explicitly say when the government's interest in substitute property vests, and the Second Circuit has yet to address this precision question"). However, at least one court in this district has found that where the government fails to satisfy the burden of § 853(p)[2], the government's interest vests at the time of the issuance of the POF. *Id.* at 565 ("The plain text of the criminal forfeiture statute requires the government to demonstrate, prior to obtaining substitute assets, that the offense property cannot be obtained 'as a result of any act or omission of the defendant.' Until the government has satisfied that burden it plainly cannot acquire an interest in substitute property. Accordingly, the government's interest in Mr. Espada's pension vested on January 23, 2014, when the Court entered a preliminary order forfeiting his pension in the substitute property.") (citations omitted). In contrast, another court in the Second Circuit concluded that the government's interest vests at the time of indictment. *United States v. Peterson*, 820 F. Supp. 2d 576, 585 (S.D.N.Y. 2011), aff'd on other grounds by *United States v. Crew*, 537 F. App'x 3 (2d. Cir. 2013).

Regardless of whether this Court follows the reasoning of *Espada* or *Peterson*, Mrs. Korchevsky has priority of ownership. The Government's interest did not vest until, at the earliest, August 5, 2015, the date of the indictment.[3] As noted in her petition, Mrs. Korchevsky acquired all of the Property at Issue prior to that date. Therefore, Mrs. Korchevsky can prove by a preponderance of the evidence, and is prepared to do so at the scheduled hearing, that her rights in the Property at Issue vested prior to the Government's.

## IV. CONCLUSION

For the foregoing reasons, Mrs. Korchevsky respectfully requests that Government's request to adjourn the hearing scheduled for June 19, 2017 until at least thirty days after the disposition of the criminal case against Vitaly Korchevsky be denied.

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[2] Substitute assets can only be forfeited after the government has made a threshold showing that the offense property: (1) "cannot be located upon the exercise of due diligence;" (2) "has been transferred or sold to, or deposited with, a third party;" (3) "has been placed beyond the jurisdiction of the court;" (4) has been substantially diminished in value;" or (5) "has been commingled with other property which cannot be divided without difficulty." 21 U.S.C. § 853(p)(1).

[3] The earliest POF was issued September 12, 2016. Dkt. 104.

Thank you for your Honor's consideration of this submission.

Respectfully,

Martin S. Bloor
Richard J. Zack

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cc: Richard J. Zack, Esq. (w/ enclosure)
Christopher A. Ott, Esq. (w/ enclosure)
Christopher L. Nasson, Esq. (w/ enclosure)
Julia Nestor, Esq. (w/ enclosure)
Richard M. Tucker, Esq. (w/ enclosure)
Tanisha R. Payne, Esq. (w/ enclosure)
Una A. Dean, Esq. (w/ enclosure)
Whitman G.S. Knapp, Esq. (w/ enclosure)
Steven G. Brill, Esq. (w/ enclosure)
James L. Healy, Esq. (w/ enclosure)
Kannan Sundaram (w/ enclosure)
Linda Gail Moreno (w/ enclosure)
Jerome J. Froelich, Jr. (w/ enclosure)